No. 12298

In The United States
COURT OF APPEALS
For the Ninth Circuit

ALASKA STEAMSHIP COMPANY, a Corporation
Appellant,

v.

M. P. MULLANEY, Commissioner of Taxation, Territory of Alaska,
Appellee.

Upon Appeal from the District Court for the Territory of Alaska, First Division

BRIEF FOR APPELLEE

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For Appellee.

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BRIEF FOR APPELLEE

OPINION BELOW

The opinion of the District Court is reported in 84 Fed. Supp. 561 (1949).

JURISDICTION

This is a suit to enjoin the appellee from enforcing the provisions of the Alaska Net Income Tax Act against appellant; to have declared invalid the provisions of the Act requiring appellant to withhold for income tax purposes upon the wages of its employees, including seamen; and to have declared invalid the Act in its entirety. Judgment and decree was entered on

July 8, 1949, sustaining the validity of the Act with certain exceptions, vacating a preliminary injunction and dismissing the complaint (R. 68). Petition for allowance of appeal was filed July 9, 1949, and order allowing appeal was signed July 9, 1949, (R. 70, 75). The jurisdiction of the district court was invoked under the Act of June 6, 1900, c. 786, §4, 31 Stat. 322, as amended, 48 USCA §101. The jurisdiction of this court rests on §1291 of the New Federal Judicial Code.

QUESTIONS PRESENTED

1. Whether Chapter 115, Session Laws of Alaska, 1949, known as the Alaska Net Income Tax Act, imposing a net income tax, is a valid exercise of the taxing authority of the Territory.

2. Whether, with regard to certain features of the Alaska Net Income Tax Act, a justiciable controversy is presented.

3. Whether, if some provisions of the Alaska Net Income Tax Act are invalid, the remainder of the Act may be given effect.

STATEMENT

Appellee does not controvert the statement of the case as found in appellant's brief, pages 3 to 7

SUMMARY OF ARGUMENT

I.

The power to enact a graduated net income tax statute is fully within the authority of the territorial legislature as granted to the Territory by Congress in the Organic Act of Alaska.

A. A graduated net income tax adopts a classification that is rationally related to the distribution of the burdens of government, and in its nature it assures

equality of treatment. *Shaffer v. Carter*, 252 U.S. 37 (1919). The Alaska Net Income Tax Act, therefore, satisfying that standard of equality demanded by the equal protection clause of the 14th Amendment, or the Civil Rights Act, (Act of May 31, 1870, c. 114, §16, 116 Stat. 144, 8 USCA §41), also satisfies the uniformity provisions of Section 9 of the Organic Act of Alaska, (Act of Aug. 24, 1912, c. 387, §9, 37 Stat. 514, 48 USCA §78), since the two standards are substantially the same. *Alaska Fish Salting & By-Products Co. v. Smith*, 255 U.S. 44, 49-50 (1920); *Lake Superior Consolidated Iron Mines v. Lord*, 271 U.S. 577, 581 (1925).

B. There is nothing in the Act that can be construed as a hostile or oppressive discrimination against certain classes of taxpayers. The allocation formulae in the Act and the provisions of Section 5A(2) (c) show an intent to adjust the tax burden with a fair degree of equality, all that is necessary in order to satisfy constitutional requirements. *Colgate v. Harvey*, 296 U.S. 404, 422 (1935). Moreover, appellant has not shown itself to be within the class of persons with respect to whom certain portions of the Act are alleged to be unconstitutional, a prerequiste to a decision as to their constitutionality. *Heald v. Dist. of Columbia*, 259 U.S. 114, 123 (1921); *Alabama State Federation of Labor v. McAdory*, 325 U.S. 450, 462-463 (1944).

C. There is no burden on interstate commerce, since the whole purpose of the apportionment formulae and other provisions of the Act is to tax only income derived from property and business within the Territory. *U. S. Glue Co. v. Oak Creek*, 247 U.S. 321

(1917). Section 12. C of the Act does not make the payment of the tax a condition precedent to engage in interstate commerce. *St. Louis S.W. Rwy. Co. v. Kansas*, 235 U.S. 350, 368-371 (1914).

D. The provision for incorporation by reference of future amendments of the Internal Revenue Code and regulations of the Commissioner of Internal Revenue is nothing more than a reference to contingent facts and is to this extent an exercise of legislative will rather than a surrender or delegation of it. However, if this adoption were held to be invalid delegation of legislative power, such provision can be severed from the Act without affecting the validity of the remainder. *Utah Power & Light v. Pfost*, 286 U.S. 165, 184-185 (1932).

E. Section 7. D of the Act, rather than delegating legislative authority to the Tax Commissioner, merely confers upon him a limited discretion as to the manner of effectuating clearly defined legislative policy. The legislature should not be compelled to prescribe detailed rules to cover myriad situations that may possibly arise in the adminstration of a taxing statute. *American Power Co. v. Securities Exch. Comm.*, 329 U.S. 90, 105 (1946).

F. The legislative intent in the Act is clear and unambiguous. There is no warrant for setting the Act aside on asserted grounds of uncertainty and indefiniteness. *Sutherland Statutory Construction, Horack's Third Edition*, Vol. 2, §4920.

II.

Congressional objectives and policy in enacting comprehensive statutes for the protection of seamen are not

defeated by the withholding provisions of the Alaska Net Income Tax Act as they apply to seamen's wages. The essential uniformity of maritime law is not interfered with since here the essential features of an exclusive federal jurisdiction are not involved. *Standard Dredging Co. v. Murphy*, 319 U.S. 306 (1942).

III.

If necessary to be used, the severability provisions of Section 15 of the Act must be given due consideration. *Elec. Bond & Share Co. v. Securities Exch. Comm.*, 303 U.S. 419, 434 (1937). Even assuming that references to future amendments to the Internal Revenue Code and regulations of the Commissioner of Internal Revenue constitute an invalid delegation of legislative authority, there is no warrant for presuming that the legislature intended that the vital objective of the Act, the tax, should not be preserved. *Utah Power & Light Co. v. Pfost*, 286 U.S. 165, 185 (1932).

IV.

The legislature may ratify that which it possesses the power to do in the first instance. Tax withholdings made pursuant to the Act of January 22, 1949, were, therefore, validated by Section 16 of the Act of March 26, 1949. *Board of Education v. Board of Commissioners*, 183 N.C. 776, 111 S.E. 531, 532 (1922).

V.

The rule that equity will determine all questions material to a controversy in order to afford complete relief is no exception to the rule that the court will not give advisory opinions in hypothetical cases. With regard to certain allegations of invalid classifications in the Act, there is no set of facts before the court with

reference to which decision as to constitutionality need be given. *Alabama State Federation of Labor v. McAdory*, 325 U.S. 450, 461-471 (1944).

ARGUMENT

I.

CHAPTER 115, SESSION LAWS OF ALASKA, 1949, IS A VALID EXERCISE OF LEGISLATIVE AUTHORITY GRANTED TO THE TERRITORY OF ALASKA BY CONGRESS IN THE ORGANIC ACT.

A. The Territory has power to enact a graduated income tax law without violating uniformity and equality requirements of the Organic Act and Civil Rights Act.

In Section 9 of the Organic Act of Alaska, (Act of Aug. 24, 1912, c. 387, §9, 37 Stat. 514; 48 USCA 77), Congress has provided that the legislative power of the Territory shall extend to "all rightful subjects of legislation." This includes full and comprehensive power to legislate in matters of taxation, and the territorial income tax law is, therefore, fully within the authority of the legislature. *Peacock v.. Pratt*, 121 F. 772, 775-776 (1903).

Taxation being but the means by which government distributes the burden of its costs among those who enjoy its benefits, *Welch v. Henry*, 305 U.S. 134, 144 (1938), it necessarily follows that once the power to tax exists, classification in a taxing scheme that has a reasonable relation to the equitable distribution of the burden of government and is not arbitrary or capricious, satisfies that standard of equality demanded by the equal protection clause of the 14th Amendment, or the Civil Rights Act. A graduated income tax by its very nature assures equality of treatment

because the burden of the exaction varies with the increase or decrease of earnings and with the comparative success or failure of one's business, *Stewart Dry Goods Co. v. Lewis*, 294 U.S. 550, 560 (1934), and thus has a rational relation to the capacity to pay and the justice of the payment. *Shaffer v. Carter*, 252 U.S. 37, 51 (1919). Cf. *Fox. v. Standard Oil Co. of N. J.*, 294 U.S. 87, 101 (1934).. As was stated in *Shaffer v. Carter*, supra, Pg. 51, by Mr. Justice Pitney:

> "Income taxes are a recognized method of distributing the burdens of government, favored because requiring contributions from those who realize current pecuniary benefits under the protection of the government and because a tax may be readily proportioned to their ability to pay . . . ."

And since the standard of uniformity under Section 9 of the Organic Act is substantially the same as the standard of equality under the 14th Amendment to the Federal Constitution, the requirement of uniformity in Section 9 is disposed of by what has been said of the classification when considered with reference to the Constitution. *Alaska Fish Salting & By-products Co. v. Smith*, 255 U.S. 44, 49-50 (1920); *State Board of Tax Commissioners v. Jackson*, 283 U.S. 527, 542 (1930); *Fox v. Standard Oil Co. of N. J.*, 294 U.S. 87, 102 (1934); *Lake Superior Consolidated Iron Mines v. Lord*, 271 U.S. 577, 581 (1925). Cf. *Ballester-Ripoll v. Court of Tax Appeals of Puerto Rico*, 142 F. (2d) 11, 18 (1944).

A graduated net income tax is not a direct tax on property. The case of *Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429 (1894), cited by appellant in

its brief, (pg. 22), did not hold that income taxes necessarily came within the class of direct taxes on property, *Brushaber v. Union Pac. R.R.*, 240 U.S. 1 (1916), but only that taxes on incomes from certain sources would be held to be direct taxes within the meaning of the constitutional requirement as to apportionment. *Bowers v. Kerbaugh-Empire Co.*, 271 U.S. 171, 174 (1925); *N. Y. ex rel Cohn v. Graves*, 300 U.S. 308, 315 (1936). The Act does not levy a tax on income derived only from rents of land, but on income from all sources, and therefore, does not place a special burden upon property by virtue of the ownership thereof. *Miles v. Dept .of Treasury*, 209 Ind. 172, 199 N.E. 372 (1935); *Featherstone v. Norman*, 170 Ga. 370, 153 S.E. 58 (1930).

B. The Act does not create arbitrary or unreasonable classifications in violation of the Civil Rights Act or the Organic Act, and does not attempt to tax income beyond the taxing jurisdiction of the Territory.

(1) It is hardly conceivable that the legislature's failure to take into consideration taxpayers' unused net operating loss deductions under Section 122 of the Internal Revenue Code can be construed as a hostile and oppressive discrimination against those operators who have no net operating loss deductions. (Appellant's Brief, pg. 23, 24.) These are nothing more than possible differences in tax burdens not shown to be substantial, and there is nothing here that indicates an arbitrary or capricious exercise of legislative discretion. *Welch v. Henry*, 305 U.S. 134, 145. Equality of treatment demanded by the Organic Act and the Civil Rights Act does not require the legislature to maintain rigid rules of taxation, achieve scientific

uniformity, or resort to meticulous adjustments in the creation of taxing statutes. *Welch v. Henry*, supra; *Fox v. Standard Oil Co. of N. J.*, 294 U.S. 87, 102 (1934); *Carmichael v. So. Coal Co.*, 301 U.S. 495, 510 (1936); *Mutual Loan Co. v. Martell*, 222 U.S. 225, 235 (1911).

(2) The fact that no allocation formula is set out in the Act for the non-resident employees of appellant who are not vessel personnel does not establish unconstitutionality. (Appellant's Brief, pg. 25, 26.) There is nothing contained in the Act which indicates an intent to impose a greater tax on non-voyage personnel who have been employed in Alaska for the same length of time and at the same rate of pay as voyage personnel—the only intent is to tax the non-resident non-voyage employees of appellant with respect to a portion of their Federal withholding tax which is properly allocable to income obtained within the Territory. This legislative objective is legitimate. *Shaffer v. Carter*, 252 U.S. 37, 52 (1919).

Also there is no showing in the record that any non-voyage employees of appellant who have been employed in the Territory for any length of time and for whom no apportionment formula was provided in the Act have been discriminated against by the imposition of a tax higher than that imposed on other employees in similar circumstances but for whom an apportionment formula is provided. Appellant, in effect, is contending that the Act may possibly be applied unconstitutionally at some indefinite future time, and moreover, applied not to it but to others. The court will not, in advance of such applications,

pass upon different phases of a statute as comprehensive as this until faced with cases involving particular provisions as specifically applied to persons who claim to be injured. It is a settled rule that courts will not give advisory opinions in hypothetical cases. *Watson v. Buck*, 313 U.S. 387, 402 (1940); *Anderson Nat'l. Bank v. Luckett*, 321 U.S. 233, 242 (1943); *Alabama State Federation of Labor v. McAdory*, 325 U.S. 450, 462-463 (1944); *Heald v. District of Columbia*, 259 U.S. 114, 123 (1921); *Jeffrey Mfg. Co. v. Blagg*, 235 U.S. 571, 576 (1914); *Hawkins v. Bleakly*, 243 U.S. 210, 214 (1916).

(3) No invalid discrimination between manufacturing and extractive industries and other industries results from the allocation formula under Section 5 A. (2) (a) of the Act which provides that gross receipts from sources within the Territory shall include "income received or derived from sales wherever made of goods, wares and merchandise manufactured or originating in the Territory." Appellant has not shown itself to be within the class of persons with respect to whom this part of the Act is alleged to be unconstitutional, *Heald v. District of Columbia*, 259 U.S. 114 (1921), and, moreover, even if the "manufacturing or extractive industries" could show that the definition of gross receipts in this subsection would produce inequitable results if included in the allocation formula applicable to them, another provision of the Act, Section 5 A. (2) (c), will take care of such situations. And it is not reasonable to assume in advance that the Commissioner of Taxation will discriminate against the "manufacturing or extractive industries" by refusing to adhere to the legislative

command in this latter section of the Act to allocate the tax in a different manner in the event the allocation formula governing such industries appears to produce inequitable results. As was stated in *Watson v. Buck*, 313 U.S. 387, 402 (1940), by Mr. Justice Black:

> ". . . . . Since all contingencies of attempted enforcement cannot be envisioned in advance of these applications, courts have in the main found it wiser to delay in passing upon the constitutionality of all the separate phases of a comprehensive statute until faced with cases involving particular provisions as specifically applied to persons who claim to be injured. Passing upon the possible significance of the manifold provisions of a broad statute in advance of efforts to apply the separate provisions is analagous to rendering an advisory opinion upon a statute or a declaratory judgment upon a hypothetical case. It is of course conceivable that a statute might be flagrantly and patently violative of express constitutional prohibitions in every clause, sentence and paragraph, and in whatever manner and against whomever an effort might be made to apply it. It is sufficient to say that the statutes before us are not of this type . . . ."

See also *Alabama State Federation of Labor v. McAdory*, 325 U.S. 450, 461-462 (1944).

Therefore, rather than showing a clear indication that the purpose or effect of the Act is a hostile or oppressive discrimination against particular classes of taxpayers, a prerequisite to the avoidance of the law on constitutional grounds of inequality, *Heisler v. Thomas Colliery Co.*, 260 U.S. 245, 255 (1922); *Mad-*

den v. Ky., 309 U.S. 83, 88 (1939), the obvious intent and general operation of the Act is to adjust the tax burden with a fair and reasonable degree of equality. This is all that is necessary to satisfy the standard of equality demanded by the Civil Rights Act. *Colgate v. Harvey*, 296 U.S. 404, 422 (1935).

Some reliance is placed by appellant on the contention that the alleged discrimination has a result of imposing a tax on income derived from sources outside the Territory, thus constituting a violation of the 5th Amendment to the Federal Constitution. Suffice it to say, no attempt has been made to enforce the Act in a manner that would produce such a result, and, therefore, what has been said above with regard to the asserted invalid classification disposes of this contention. *Watson v. Buck*, 313 U.S. 387, 402 (1940).

C. The Act does not impose an unconstitutional burden upon interstate commerce.

Once it is decided that the Territory may consistently with due process of law impose a general net income tax on non-residents from their property and business within the Territory, *Shaffer v. Carter*, 252 U.S. 37 (1919), it is no objection, as far as the commerce clause is concerned, that the tax is imposed on gains derived in part, or even mainly, from interstate commerce. *Underwood Typewriter Co. v. Chamberlain*, 254 U. S. 113, 119-120 (1920). The whole purpose of the apportionment formula in Section 5 A (2) (b) and the provisions of Section 5 A (2) (c) is to impose a tax on appellant which is fairly apportioned to its net gains derived solely from its property and business within the Territory, and when this is done,

there can be no unconstitutional burden upon interstate commerce. *U. S. Glue Co. v. Oak Creek*, 247 U.S. 321 (1917); *Western Livestock v. Bureau of Revenue*, 303 U.S. 250, 255-256 (1937); *Central Greyhound Lines v. Mealey*, 334 U.S. 653, 663 (1947). The tax is non-discriminatory, that is, it places no greater burden on interstate commerce than it does on intrastate commerce of like character, and it is not open to the objection of possible multiple state taxation since no other state can consistently with due process impose an income tax measured by gains derived from property and business within the Territory. The apportionment formula is itself a guard against such a vice. See concurring opinion of Mr. Justice Rutledge in *Memphis Natural Gas Co. v. Stone*, 335 U.S. 80, 96-97 (1947). Plainly, the Territory has attempted to tax only that which it is entitled to tax and there is nothing about the apportionment formula which demonstrates that an unfair and inequitable result would be reached. *International Harvester Co. v. Evatt*, 329 U.S. 416, 421-422 (1946).

Section 12 C of the Act is merely one of the methods adopted by the legislature for enforcement of payment of the tax and it is not required to be construed so as to make such payment a condition precedent to engaging in interstate commerce. Since the tax applies to all persons conducting a business in the Territory, irrespective of whether they are engaged in commerce, it was natural that the language of Section 12 C with such broad scope should be adopted. No situation has yet arisen where the provisions of this section have been applied in such a manner as to deprive appellant

of its privilege of engaging in an interstate business, and it is not to be presumed that the Territory, through its judicial and administrative officers, will not interpret these provisions as being limited in operation to suspension for non-payment of the tax of only the privilege of doing an intrastate business. *St. Louis S.W. Ry. Co. v. Kansas*, 235 U.S. 350, 368-371 (1914). When the legislature enacts a statute, there is no presumption that it intended to exceed the limits of the Constitution. It is a fundamental rule that the courts will adopt that construction of a statute which will uphold its validity. *St. Louis S.W. Ry. Co. v. Kansas*, supra; *Corp. Comm. of Oklahoma v. Lowe*, 281 U.S. 431, 438 (1929); *So. Utah Mines & Smelters v. Beaver County*, 262 U.S. 325, 331 (1922); *Plymouth Coal Co. v. Pa.*, 232 U.S. 531, 546 (1913).

D. The Act does not invalidly delegate legislative functions to Congress.

When the Net Income Tax Act was enacted by the territorial legislature, it became a complete law having its own binding force and not dependent upon additional consent or action for its existence and operation. The question of expediency or discretion in imposing an income tax was not delegated to any other legislative tribunal; the territorial legislature decided the expediency of the law solely by itself and for its own reasons. It remains a law whether Congress legislates or not, and the fact that it incorporates by reference future amendments of the Internal Revenue Code does not constitute an abdication or delegation of legislative power. The reference to future amendments is nothing more than a reference to an extrinsic and contingent

fact by which the amount of the tax may be conceivably changed. Because this extrinsic fact is the action of another legislative body, it does not mean that the discretion and judgment of the other body is substituted for that of the territorial legislature. Rather than being a destruction of the latter's discretion and abridgment of its duties and judgment, this is in itself an exercise of the legislative will. It could not be seriously contended that the legislature could not, by a series of separate acts, follow the changes in the Internal Revenue Code. Then why could it not do so by adopting such future changes in one enactment? Such action is merely an economy to the Territory and a convenience to the taxpayers, and to deny this power to the legislature would seriously curtail the extension of its authority to all rightful subjects of legislation. *People v. Fire Ass'n. of Phila.*, 92 N.Y. 311, 44 Am. Rep. 380 (1883), affirmed in 119 U.S. 110; *Underwood Typewriter Co. v. Chamberlain*, 94 Conn. 47, 108 Atl. 154, 160-161 (1919), affirmed in 254 U.S. 113.

Assuming, however, that references to future amendments of the Internal Revenue Code constitute an invalid delegation of legislative power, the entire Act should not fail since those provisions are clearly separable under Section 15 of the Act. It is entirely reasonable to presume that the legislature would have declared that the tax being the vital objective of the Act would be preserved even though the contingency of future amendment of the Internal Revenue Code may never occur, *Utah Power & Light v. Pfost*, 286 U.S. 165, 184-185 (1932); *Watson v. Buck*, 313 U.S. 387, 396-397 (1940), and once the reference to future

amendments is removed from the Act, then the adoption of the Internal Revenue Code can refer only to that law as it existed at the time the territorial statute was enacted, *Kendal v. U. S.*, 12 Peters 524 (1838), and in that respect such an adoption is valid. *Featherstone v. Norman*, 170 Ga. 370, 153 S.E. 70 (1930).

E. The Act does not delegate legislative authority to the Tax Commissioner.

The provisions of Section 7 D of the Act are not an attempted delegation of legislative judgment and discretion as to what the law shall be, but are merely the conferring of a legitimate discretion on the Tax Commissioner to execute the law in accordance with legislative specifications and policy. The objective of this section of the Act—which is for the benefit of the taxpayer—is clear, that is, to return to the taxpayer any taxes that should not have been paid, and all the Tax Commissioner has is a limited discretion as to the manner of effectuating this legislative policy. This is not a grant of unbridled administrative discretion or an abrogation of legislative will and judgment, but it is rather a reasonable and necessary provision for the taking care of complex administrative details that may arise—the only practicable way in which legislative process would be able to function. *Bowles v. Wellingham*, 321 U.S. 503, 514-516 (1943). If the legislature were forced by meticulous and scientific adjustments to foresee and provide for the myriad situations which may arise in the future in the execution of the Act, and to make rules for each of these situations, then the legislative process would be unduly hampered and would bog down. Necessity fixes a point

beyond which it becomes unreasonable to compel the legislature to prescribe detailed rules. *American Power Co. v. Securities & Exch. Comm.*, 329 U.S. 90, 105 (1946).

F. The Act is not invalid because of indefiniteness and uncertainty.

What has been said above with regard to the incorporation by reference of future amendments of the Internal Revenue Code and of future regulations of the Commissioner of Internal Revenue disposes of the contention that these factors cause the Act to fail on the grounds of indefiniteness and uncertainty. The mere reference to extrinsic facts that may occur in the future cannot deprive the taxpayer of any constitutional right since he will know with certainty at the time the tax is payable what his liability is, and the fact that he may not know this before that time is nothing more than a necessary consequence of a complex government setup. The indefiniteness does not cause a taxpayer to act at his peril or subject himself to a possible invalid penalty with a consequent danger of being deprived of property without due process of law. Cf. *Hy-Grade Provisions Co. v. Sherman*, 266 U.S. 497, 501 (1924); *Champlin Refining Co. v. Corp. Comm. of Okla.*, 286 U.S. 210, 243 (1931). The legislative intent in the Act is clear, and this is not a case where there is such ambiguity that after exhausting every rule of construction, no sensible meaning can be given to a statute. There is absolutely nothing vague or uncertain about this Act. (See *Sutherland Statutory Construction; Horack, 3rd Edition, Volume* 2, §4920.)

Failure to define the word "income" does not cause

the Act to fail because of uncertainty. That word when taken in its context makes the meaning clear, and when that is true, the use of the word without specific definition does not render the statute invalid. *Joseph Triver Corp. v. McNeil*, 363 Ill. 559, 5 N.E. (2nd) 929 (1936). A taxpayer cannot be deprived of any constitutional right by the failure of the legislature to define the word "income" when all that he does is to pay a tax to the Territory equal to 10% of the tax he pays to the Federal government under the Internal Revenue Code and under which law "income" is sufficiently defined. This cannot make computation of the tax uncertain.

II.

THE WITHHOLDING TAX PROVISIONS OF CHAPTER 115, SESSION LAWS OF ALASKA, 1949, ARE VALID AS APPLIED TO SEAMEN.

The Federal statutes relating to seamen's wages contained in the Act of June 7, 1872, c. 322, §32, 17 Stat. 268, as amended, Title 46 USCA § 591 to 605, §682 to 685, contain nothing in their terms prohibiting either the imposition of an income tax on seamen or prohibiting the means of collecting the tax by withholding at the source. There is, therefore, no conflict in express terms between the Alaska Net Income Tax Act and the Federal statutes relating to seamen's wages .

There is also no conflict between the two statutes arising from the nature of the subjects covered by each, and there is no interference with the uniformity of maritime law. Statutes providing for the payment of a seaman's wages in full, 46 USCA 597; prohibiting the advances and allotments of wages, 46 USCA 599;

prohibiting stipulations of seamen whereby they may forfeit their right to a lien upon the ship and deprive themselves of any remedy for recovery of wages, 46 USCA 600; prohibiting the attachment or arrestment or assignment of seamen's wages, 46 USCA 601; and providing for payment of wages of a seaman without any deduction whatever, any contract to the contrary notwithstanding, 46 USCA 605; cannot by any rule of statutory construction be interpreted to mean that because one is a seaman, he is relieved from the obligation imposed upon other citizens to bear his fair share of supporting the government that offers him protection. The purpose and policy of Congress in enacting comprehensive laws relating to seamen has been stated by the courts in different ways; for example, in order to protect the seamen "who as a class are poor, friendless and improvident", *Calmar Steamship Corp. v. Taylor*, 303 U.S. 525, 528 (1937); to protect the individual seaman who was "unable to cope effectively with his employer in bargaining", *Hume v. Moore-McCormack Lines*, 121 F. (2nd) 336, 342 (1941); in order to "maintain a merchant marine for the commercial service and maritime defense of the nation by inducing men to accept employment in an arduous and perilous service", *Calmar Steamship Corp. v. Taylor*, supra; or to prevent the seaman from disposing of his wages by either a voluntary or involuntary assignment, "which would interfere with the remedy in admiralty for the recovery of his wages by condemnation of the ship", *Wilder v. Inter-Island Navigation Co.*, 211 U.S. 239, 248 (1908). These congressional objectives reasonably could not be defeated by the withholding from

the seaman's wages of 10% of the amount that is now withheld from his wages for the Federal income tax. It is not reasonable to assume that the obligation to support government has the necessary effect of exposing a seamen to the danger of improvident contracts or the effect of placing an obstacle in the development of a strong merchant marine service. Thus there is nothing in the payment of an income tax by withholding at its source that is hostile or materially prejudicial to general maritime law, or that has the effect of interfering with the essential uniformity of such law. Congress it may be admitted, has manifested an intention to occupy the entire field so far as the protection of seaman is concerned, but the Alaska Net Income Tax Act in no way encroaches in that field. The congressional purpose can be accomplished even in the presence of the Alaska statute. In dealing with the territorial income tax Act, essential features of an exclusive Federal jurisdiction are not involved. *Just v. Chambers*, 312 U.S. 383, 392 (1941); *Standard Dredging Co. v. Murphy*, 319 U.S. 306 (1942).

III.

THE SEVERABILITY CLAUSE.

The provisions of Section 15 of the Act, the severablity clause, if necessary to be utilized, will prevent the Act from failing in its entirety. This provision reverses the presumption that the legislature intended the Act to be effective as an entirety or not at all, and when the court attempts to ascertain legislative purpose, due consideration must be given to this express legislative declaration. *Elec. Bond & Share Co. v. Securities Exch. Comm.*, 303 U.S. 419, 434 (1937).

Assuming, for the sake of argument, that the Act attempts to delegate legislative functions to Congress and the Commissioner of Internal Revenue, such provisions are not so interwoven with the remainder of the Act that there is any inherent difficulty in separation and enforcement of the remainder and vital portions. There is no warrant for concluding that the legislature would be satisfied to sacrifice an important revenue measure in the event the relatively unimportant future contingencies could not be incorporated into the Act. *Utah Power & Light Co. v. Pfost*, 286 U.S. 165, 185 (1932).

It is, of course, conceivable that future changes in the Internal Revenue Code and regulations of the Commissioner of Internal Revenue might lead to complications in the enforcement of the Act, but such considerations, especially in the absence of facts showing any infringement of appellant's rights, do not furnish sufficient grounds to invalidate the Act. *Santee Mills v. Query*, 122 S.C. 158, 115 S.E. 202, 206 (1922).

IV.

WITHHOLDINGS MADE PURSUANT TO THE ACT OF JANUARY 22, 1949, WERE VALIDATED BY THE ACT OF MARCH 26, 1949.

Even though the District Court has held that the extraordinary session of the legislature which enacted the original income tax law on January 22, 1949, was an authorized session, from which it follows that this law, together with tax withholdings made pursuant thereto, were invalid; yet since the legislature which convened in regular session on January 27, 1949, had the power and authority to do what the extraordinary

session had done, Section 16 of the Act, the ratification by the regular session of the extraordinary session's actions, had the effect of validating the tax withholdings made pursuant to the original statute. A ratification can be made when the party ratifying possesses the power to perform the act ratified. *Marsh v. Fulton County*, 10 Wall 676, 684, 19 L. Ed. 1040, 1042 (1869).

This ratification by the regular session of the legislature was the curing of a statute which was defective not because the subject matter was forbidden by the Constitution or the Organic Act, but because of the mere neglect of some legal formality. The subject matter of the statute being something that the legislature could have authorized previously, the curative statute was, therefore, proper and effective. *Board of Education v. Board of Commissioners*, 183 N.C. 776, 111 S.E. 531-536 (1922); *Anderson County Road Dist. v. Pollard*, 116 Tex. 547, 296 S.W. 1062 (1927); *Sutherland Statutory Construction, Horack's Third Edition*, §2214, 2219.

V.

THE RULE THAT EQUITY WILL DETERMINE ALL QUESTIONS MATERIAL TO A CONTROVERSY IN ORDER TO AFFORD COMPLETE RELIEF IS NO EXCEPTION TO THE RULE THAT THE COURT WILL NOT GIVE ADVISORY OPINIONS IN HYPOTHETICAL CASES.

Although, as a general rule, where equitable jurisdiction has been invoked for injunctive purposes, the court has power to decide all relevant matters in dispute and to award complete relief even though the decree includes that which might be conferred by a court of law, *Porter v. Warner Co.*, 328 U.S. 395, 399

(1945), yet the "relevant matters in dispute" and the relief that "might be conferred by law" presuppose the existence of particular facts with reference to which a decision on constitutionality must be given, and not upon appellant's conception of its duty to all of its employees to challenge the tax on every conceivable ground. Here appellant's assertions that the Act contains unreasonable classifications and is lacking in uniformity are based upon hypothetical contingencies of attempted enforcement of the Act, and not upon a precise set of facts involving specific provisions which have been applied to those who claim to be injured. *Alabama State Federaton of Labor v. McAdory*, 325 U. S. 450, 461-471 (1944). Consequently the court need not consider appellant's contentions that the Act discriminates against taxpayers with no net operating loss deductions, against employees for whom no allocation formula is provided, and against manufacturing and extractive industries.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the Alaska Net Income Tax Act is a lawful exercise of legislative authority, valid in its entirety, and that the decree of the District Court should, therefore, be affirmed.

Respectfully,

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Chapter 115, Session Laws of Alaska, 1949

* * *

Section 5. TAX ON INDIVIDUALS, FIDUCIARIES, CORPORATIONS AND BANKS.

A. GENERAL RULE. There is hereby levied and there shall be collected and paid for each taxable year upon the net income of every individual (except employees whose sole income in Alaska consists of wages or salary upon which tax has been withheld as referred to in subsection B of this Section), fiduciary, corporation and bank, required to make a return and pay a tax under the Federal income tax law, a tax computed by either one of the following methods:

(1) a tax equal to 10 percent of the total income tax that would be payable for the same taxable year to the United States under the provisions of the Internal Revenue Code without the benefit of the deduction of the tax payable hereunder to the Territory.

(2) a tax equal to 10 percent of that portion of the total income tax that would be payable under the provisions of the Internal Revenue Code without the benefit of the deduction of tax payable hereunder to the Territory, that gross receipts derived from sources within the Territory, payroll and value of tangible property located in the Territory, bears to the total gross receipts from sources within and without the Territory, payroll and value of tangible property within and without the Territory.

(a) DETERMINATION OF GROSS RECEIPTS. Gross receipts from sources within the Territory shall consist of interest, rents, royalties, gains, dividends, all other income and gross income received or derived in

connection with propetry owned or a business or trade carried on and salaries, wages and fees for personal services performed within the Territory. Income received or derived from sales wherever made of goods, wares and merchandise manufactured or orginating in the Territory shall be considered to be a part of gross receipts from sources within the Territory.

(b) DETERMINATION OF PROPERTY AND PAYROLL FACTORS FOR FREIGHT AND PASSENGER CARRIERS. The value of vessels operating on the high seas and compensation of employees engaged in operating such vessels shall be apportioned to the Territory in the ratio which the number of days spent in ports within the Territory bears to the total number of days spent in ports within and without the Territory. The term "days spent in ports" shall not include periods when ships are tied up because of strikes or withheld from the Alaska service for repairs, or because of seasonal reduction in service. Days in ports shall be computed by dividing the aggregate number of hours in all ports by 24. The value of aircraft and automotive vehicles operating as freight and passenger carriers from, to and within the Territory and compensation of employees engaged in such operations, shall be apportioned to the Territory in the ratio which the number of days during which such services are rendered within the Territory bears to the total number of days during which such services are rendered within and without the Territory.

(c) APPORTIONMENT OF TAX BY TAX COMMISSIONER. If the taxpayer, upon petition to the Tax Commissioner, as provided in Section 13 of this

Act, conclusively demonstrates that because of other factors, the method of allocation hereinabove provided, results in a larger tax than in equity and good conscience he should have been required to pay, then the tax shall be determined, allocated and apportioned under such processes and formulas as the Tax Commissioner shall provide, and the Tax Commissioner may promulgate proper apportionment rules and regulations conformable with this Act for general application in similar cases. In the case of two or more organizations, trades or businesses owned or controlled directly or indirectly by the same interest, the Tax Commissioner is authorized to distribute, apportion, or allocate the tax where such action is necessary to prevent evasion of payment.

* * *

Section 7. RETURNS AND PAYMENT OF TAX.

D. OVERPAYMENT, CREDIT AND REFUND. The tax Commissioner is authorized to credit or refund all overpayments of taxes, all taxes erroneously or illegally assessed or collected, all penalties collected without authority, and all taxes that are found unjustly assessed or excessive in amount, or in any manner wrongfully collected. The Tax Commissioner shall by means of rules and regulations specify the manner in which claims for credits or refunds shall be made, including adjustments with persons whose sole income in Alaska consists of wages or salary, prescribe limitations and give notice of allowance or disallowance. These rules and regulations shall be based upon the

provisions of Secs. 321 and 322 of the Internal Revenue Code insofar as such provisions are consistent with other provisions of this Act. When refund is allowed to a taxpayer, same shall be paid out of the general fund on a Territorial warrant issued pursuant to a voucher approved by the Tax Commissioner.

* * *

Section 8. COLLECTION OF INCOME TAX AT SOURCE.

B. REQUIREMENT OF WITHHOLDING. Every employer making payment of wages or salaries shall deduct and withhold a tax in the amount of 10 percent of the tax deducted and withheld under the provisions of subchapter (D), Chapter 9 of the Internal Revenue Code. Every employer making a deduction and withholding as outlined above, shall furnish to the employee upon request a record of the amount of tax withheld from such employee on forms to be prescribed, prepared and furnished by the Tax Commissioner.

* * *

Section 12. ENFORCEMENT.

C. SUSPENSION OF LICENSES. In addition to the other penalties imposed herein, any person authorized to conduct any business by virtue of a license duly issued to him under the laws of Alaska, whether he be a resident or not, shall, if he fails to pay the tax levied under Subsection (A), Section 5 of this Act, suffer suspension of his said license or licenses until the tax imposed by this Act, together with penalties, is paid in full.

* * *

Section 15. SEVERABILITY. If any provision of this Act, or the application thereof to any person or

circumstance is held invalid, the remainder of the Act and such application to other persons or circumstances shall not be affected thereby.

* * *

Section 16. REPEALS. The tax contained in subsection 3rd of Sec. 35-1-11 ACLA 1949, which reads as follows: "three quarters of one percent of the net profits from supplies sold" is hereby repealed; and the unnumbered paragraph between subsections (f) and (g) of subsection 7th of Sec. 35-1-11 ACLA 1949, which imposes a net income tax on canneries, is hereby repealed; and the tax contained in House Bill No. 1 of the Extraordinary Session of the Nineteenth Legislature, which will become Ch. 3 of the Session Laws of said session, is also hereby repealed, but tax withholdings effectuated and other administrative steps taken thereunder are hereby ratified and confirmed and made applicable hereunder so far as conformable with the provisions hereof.

APPENDIX B

Act of Aug. 24, 1912, c. 387, §9, 37 Stat. 514, 48 USCA 77.

The legislative power of the Territory of Alaska shall extend to all rightful subjects of legislation not inconsistent with the Constitution and laws of the United States . . . . .

Act of Aug. 24, 1912, c. 387, §9, 37 Stat. 514, 48 USCA 78.

All taxes shall be uniform upon the same class of subjects and shall be levied and collected under general laws, and the assessments shall be according to the actual value thereof.